

Private M&A 2021

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Private M&A

2021

Contributing editors**Will Pearce and Louis L Goldberg**

Davis Polk & Wardwell LLP

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Dominican Republic, Georgia, New Zealand, South Korea, Thailand and Zambia.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.



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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

- 1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

The most common way of acquiring a private company is through a share purchase. An asset purchase exists but is less common because it is not regulated and does not automatically transfer by operation of the business of the company. A private company can also be acquired through a statutory merger, although this is not very common.

The main advantage of a share purchase is that the target company remains as is, with ownership of the shares simply transferring to a new owner. There is no need to transfer the underlying assets and liabilities of the company, which are automatically transferred by operation of law. However, the transfer is subject to UAE authority approval(s) as part of the share transfer process. Business contracts are largely unaffected and remain in place with the target company, unless they contain change of control provisions that are triggered by the sale. This means they do not need to be assigned individually, which would leave room for counterparties to attempt to renegotiate them.

The only disadvantage of a share purchase is that all assets and liabilities remain with the business unless specifically carved out in the relevant sale and purchase documentation.

The only advantage of an asset purchase is that a buyer can pick the assets and liabilities it wants. This can help to avoid potential unknown liabilities and the main disadvantage of an asset purchase is that the assets must be transferred individually. Depending on the assets involved, there may be significant time and effort required in having to register the individual transfers. If only some of the assets are being transferred, this would be implemented through an asset transfer agreement that would not generally need to be notarised (subject to any specific requirements in respect of the transfer of specific assets).

A typical share purchase transaction would involve entering into a long form share purchase agreement (SPA) that would include conditions precedent and closing mechanics, among others. As part of closing, the shareholders would enter into a share transfer instrument and an amendment to the memorandum or articles of association of the company before the notary. Finally, transfer of title takes place by updating the licence or commercial register of the company held with the relevant department of economic development. The involvement of an escrow is usually required to keep the purchase price in escrow until the records held by the authorities are updated.

In free zones, the transfer is generally more simplified and closing can usually take place simultaneous to the execution of the share purchase agreement as transfer of title takes place once the register

of members of the target is updated and subsequent recordal of the transfer with the relevant authorities is only a formality.

The amount of time it takes to effect a typical transaction will largely depend on the parties. Administrative procedures are, where the target is not engaged in sectors that require additional approval, limited to the above process. Both actions can be handled with rather short notice. Where foreign investors are involved additional time will be required legalising documents issued by foreign authorities.

Legal regulation

- 2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The vast majority of onshore companies – that is, companies registered in the UAE outside the free zones – are regulated by the UAE Commercial Companies Law (Federal Law No. 2 of 2015) (CCL). Part 7 of the law sets out the rules for transformation, merger and acquisition of companies. Yet, some onshore companies, such as companies wholly owned by UAE federal or local governments, follow regulations that may differ from the CCL.

In addition to the CCL, private joint stock companies (PrJSC) are also regulated by additional ministerial decrees, namely Decree No. 539 for 2017 (as amended). This decree has specific provisions that govern the acquisition of shares in PrJSCs.

Companies registered in a free zone also are not necessarily governed by the CCL. Where corporate regulations have been issued for a free zone, the CCL applies only where a matter is not covered in the free zone corporate regulations. Certain free zone authorities (ie, those of the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Markets (ADGM)) have been provided with comprehensive regulatory powers with an explicit exemption of the CCL. Other free zone authorities have less legislative authority, however, while their scope may vary, corporate regulations exist for all free zones.

Aside from corporate legislation, in the CCL, Civil Code and Commercial Code, sector-specific rules may also impact M&A activity in certain industries,

Share purchase agreements can provide for a foreign governing law. Parties in the UAE generally have freedom of contract, save for certain mandatory matters or matters of public policy. One exception to this is where a Dubai government entity or department is a party to a contract. In these circumstances, a contract must be governed by UAE law unless a special exemption is obtained (Law No. 6 of 1997 regarding Contracts of Governmental Departments in the Emirate of Dubai).

In most instances where parties do not choose UAE law as the governing law, they tend to choose English law. However, for the purposes of effecting the transfer of shares, the share transfer document must be subject to UAE law. This document must be drafted in or translated to Arabic and signed before a notary.

Legal title

- 3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

Upon acquiring legal title to shares, the buyer acquires voting rights as well as rights to profits and liquidation or sale proceeds pro rata to its shareholding in the company unless otherwise agreed in the memorandum of association of the company or the shareholders' agreement. However, a shareholder cannot be fully deprived of any profits onshore. In an asset deal, legal title to a business or assets of a company differs depending on the type of assets being transferred.

In a share acquisition, legal title to a business or assets of a company transfers automatically by operation of law. However, since business or asset transfers are not explicitly regulated under applicable law, each asset of the company in question will have to be transferred individually according to the procedures applicable to the asset, based on its type.

There is no difference between legal and beneficial title onshore; however, in free zones that are governed by legislation that follows common law principles, beneficial ownership is generally acknowledged.

Multiple sellers

- 4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In the case of a limited liability company (LLC), all sellers must agree to sell owing to the existence of statutory pre-emption rights; further, in practice, in order to enter into a notarised share transfer instrument all shareholders of the company must execute such document, including exiting and non-exiting shareholders. However, in the case of PrJSC, the share transfer instrument is only signed between buyer and seller unless otherwise mentioned under the articles of association. The same generally applies in the free zones. Minority shareholders that refuse to sell cannot be squeezed out or dragged along unless they have signed a shareholder's agreement to that effect (though these types of provisions are difficult to enforce onshore).

Exclusion of assets or liabilities

- 5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

Generally, any assets or liabilities can be excluded in an asset sale and purchase. Business or asset transfers are not explicitly regulated under applicable law, that is, each asset of the company in question will have to be transferred individually according to the procedures applicable to the asset based on its type. For example, employees do not automatically transfer to a buyer in the sale and purchase of assets.

Consents

- 6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Under the CCL, shareholders of LLCs enjoy statutory pre-emption rights on a transfer of shares. These rights cannot be waived, unless agreed by all the shareholders at the time of transfer. There are no statutory pre-emption rights for shareholders of private joint stock companies. Similarly, shareholders of free zone entities do not have the benefit of statutory pre-emption rights on a transfer of shares. However, shareholders can agree such restrictions between themselves, either in the company's articles, memorandum of association or shareholders' agreement.

A transfer of shares normally requires pre-approval from the relevant mainland or free zone authority. Also certain activities require special approvals such as health. With both mainland and certain free zone companies, the share transfer is not completed until an updated licence is issued by the relevant licensing authority. However, in certain free zones recordal with the relevant authority is only a formality.

Article 10 of the CCL sets out the foreign ownership restriction which requires that 51 per cent or more of the shares in a mainland company established in the UAE be owned by one or more UAE nationals or a company that is itself wholly owned by one or more UAE nationals. The only exception to this is for nationals of other Gulf Cooperation Council (GCC) countries. In September 2017, the UAE government amended the CCL, by issuing Federal Decree Law No. 18 of 2017 allowing the UAE Cabinet the flexibility to permit increased levels of foreign ownership in certain companies and sectors of the economy.

In November 2018, the new Foreign Direct Investment Decree Law No. 19 of 2018 (FDI) was issued introducing, among other things, the framework under which the UAE Cabinet will exercise its powers in respect of permitting increased levels of foreign ownership.

The FDI Law establishes a 'negative list' of sectors in which no changes will take place and refers to a 'positive list' of sectors of the economy in which greater levels of foreign investment will be permitted than is currently the case. This positive list was recently released (July 2019) to include the sectors of the economy where foreign ownership can be increased to up to 100 per cent, subject to other conditions, such as, minimum capital requirements.

In addition to the restrictions on share ownership, certain business activities are reserved for UAE nationals or increased percentages of local ownership. These activities are established by the FDI Law in the 'negative list', which includes, for instance, oil exploration and production and banking and financing activities.

A free zone entity, on the other hand, can be 100 per cent owned by non-UAE nationals. The main disadvantage of free zone entities is that generally, they can only do business within the free zone designated area. This restriction has different implications depending on the type of company, activity and free zone in question and therefore must be considered on a case-by-case basis. For example, a construction company can enter into a joint venture with the free zone in relation to the particular project it wishes to implement in the free zone. Hence the free zone authority has the ability to grant a specific consent/permit to an entity established outside of such free zone to undertake work within the free zone.

Additionally, Economic Substance Rules were introduced in the United Arab Emirates (UAE) in April 2019, and businesses need to assess how they comply with those rules. In essence the new rules require certain legal entities established in the UAE to demonstrate that they carry out substantial economic activities there.

Any entity licensed in the UAE to carry out a 'relevant activity' whether onshore or in a free zone and including in a financial free zone, is required to comply with the Economic Substance Rules.

The 'relevant activities' are: insurance; banking; lease financing; investment fund management; shipping; holding company; intellectual property; company headquarters, and distribution and service centres.

The definitions of company headquarters and service centre are potentially very broad and may capture many UAE businesses unaware that the Rules apply. Any UAE entity that deals with related entities overseas should seek advice on whether they are caught within the Economic Substance Rules.

There is an exemption for entities in which the federal government, the government of any Emirate or any governmental authority or body has at least 51% direct or indirect ownership.

Nonetheless, as the Economic Substance Rules have only recently been enacted and are subject to ongoing assessment and interpretation, there is still a degree of uncertainty as to how they will apply.

7 | Are any other third-party consents commonly required?

Shareholders need to be informed to give them the opportunity to exercise their pre-emption rights if the company is an LLC or a PrJSC that provides for pre-emption rights under its articles of association. Also most finance, lease and material business agreements include change of control or change of shareholding provisions that either require notice or consent. If the process set out under these agreements is not followed it may result in termination of the relevant agreement. Further, if there is a pledge over the shares of the company, the transfer of shares cannot take place without the consent of the lender to which such security was given.

Regulatory filings

8 | Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

A share transfer requires filings and payment of fees, however, an asset transfer would depend on the type of asset that is being transferred (some require registration such as land, others do not such as most fixed assets).

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Both the purchaser and the seller usually retain legal, financial and tax advisers. The terms of appointment of advisers are generally in line with international standard practice.

Duty of good faith

10 | Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

UAE law requires parties to perform their obligations under a contract in good faith. The existence of heads of agreement may also give rise to this obligation and depends on the drafting of the relevant provisions. For example, breach of the obligation to negotiate in good faith may result in a party being ordered to pay damages for loss suffered by the other party resulting from the breach and any expenses that party has incurred in carrying out the negotiations.

The good faith obligation is linked to the performance of the actual terms of the contract, therefore, a party may be able to bring a claim for failing to act in good faith, if the other deliberately frustrated the satisfaction of the conditions precedent, for example.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

Terms of business and memoranda of understanding are usually executed before starting to work on the definitive documents. These generally include exclusivity and confidentiality provisions and non-binding commercial terms.

Share purchase

The following documents are commonly executed at the signing of a private company share purchase:

- long-form share purchase agreement (SPA);
- disclosure letter (making disclosures against the seller's warranties in the SPA);
- board resolutions of the buyer and the seller approving the transaction;
- powers of attorney authorising the signatories; and
- shareholders' agreement (where there will be more than one shareholder following closing).

The following are commonly executed at the closing of a private company share purchase:

- updated disclosure letter (where it has been agreed that the seller's warranties will be repeated at closing);
- any required releases of security over shares in the target, if any
- resignation letters for directors;
- documentation required for the appointment of new directors; and
- share transfer instrument and amended memorandum or articles of association.

Where the target company is an LLC or PrJSC, the implementation of the share transfer will follow the UAE procedural requirements, regardless of the law chosen to govern the deal documentation.

The SPA will contain provisions that deal with this order of events, including details of how the purchase price will move from buyer to seller, as the share transfer onshore can take up to a week to complete. The negotiating power of the parties will determine how this is done. An escrow agent will often be appointed to hold the purchase price pending the transfer of title to the shares.

Asset purchase

The following documents are commonly produced and executed at the signing of an asset purchase:

- asset or business transfer agreement;
- disclosure letter (making disclosures against the seller's warranties in the asset or business transfer agreement);
- board resolutions of the buyer and the seller approving the transaction; and
- powers of attorney authorising the signatories.

The following documents are commonly produced and executed at the closing of an asset purchase:

- updated disclosure letter (where it has been agreed that the seller's warranties will be repeated at closing);
- any required releases of security over the assets;

- novation agreements in respect of material contracts to be transferred; and
- any required transfer forms or documents to be signed in connection with the transfer of specific assets (for example, transfers of real estate).

12 | Are there formalities for executing documents? Are digital signatures enforceable?

There is no specific law addressing how documents are executed by corporate entities. Execution formalities for private companies may be set out in the constitutional documents.

It is usual to insist on board minutes and powers of attorney to ensure the authority of the relevant person to act on behalf of the relevant entity in each case (even if the constitutional documents clearly grant such power to the directors). In the case of a share transfer, a share transfer instrument will also have to be signed in front of the notary, who will require sight of all constitutional documents of the signing entity as well as a notarised, legalised and attested board or shareholder resolution of power of attorney, if the constitutional documents do not grant explicit authorities.

Generally, digital signatures are admitted as evidence of execution. The use and admissibility of electronic signatures is also governed by Federal Law No. 1 of 2006 (Electronic Transactions and Trade Law).

In addition, under article 17(3) of Federal Law No. 10 of 1992 Concerning Law of Evidence in Civil and Commercial Transactions, equal weight is to be afforded to electronic signatures, as long as they comply with the requirements of the Electronic Transactions and Trade Law.

However, in mainland UAE, when it comes to implementing a share transfer or transferring a specific asset that requires a certain type of registration, the authorities require the attendance of the authorised signatories in person or by their legal representatives.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

In an attempt to reduce costs, there is more red flag due diligence being carried out as opposed to narrative and comprehensive reports being issued for such purpose.

Specific consideration is given to matters such as:

- anti-fronting laws and foreign ownership restrictions;
- real estate ownership restrictions and hidden costs;
- change of control provision in material agreements; and
- employee gratuities and pension schemes.

It has become customary for the seller to organise a virtual data room (VDR) onto which documentation of a legal and financial nature is uploaded. The use of VDRs makes the process much more efficient, particularly if the VDR service provider is a sophisticated one. Generally, sellers are also more open to adopting a full disclosure approach, after having the comfort of executing non-disclosure agreements with potential buyers. However, it is not very common to produce vendor due diligence reports except in large-scale deals owing to the cost involved.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller can be liable for pre-contractual misrepresentation or misleading statements. Under the Civil Code, misrepresentation is 'when one of two contracting parties deceives the other by means of trickery or word or deed which leads the other to consent to what he would not otherwise have consented to' (article 185, Civil Code). Therefore, misrepresentation does not include statements made innocently or negligently. It requires a deliberate act, including deliberate silence or omission, and the burden of proof can be quite high. Article 185 of the Civil Code only applies between the parties to a contract. The parties to an agreement can exclude any liabilities except that resulting from fraud, gross negligence and wilful misconduct.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Very little information on private companies incorporated in the UAE is publicly available. In particular, a private company's articles of association and licences do not form part of any publicly available record in the UAE. To conduct an effective due diligence on the target is, therefore, not possible without the cooperation of the target and its management and shareholders.

It is possible to carry out a limited search for a company in person at the local Chamber of Commerce in Dubai and Abu Dhabi. Practices differ between emirates, but a business report providing a brief company profile will generally be available.

In addition to reviewing information provided by the seller, legal review will involve conducting appropriate searches and investigations at public registries and authorities; however, this would require the cooperation of the seller and target company.

For certain free zones, limited information on companies are accessible through the relevant free zone authority website.

Impact of deemed or actual knowledge

16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

If proven, actual knowledge may adversely impact claims a buyer may seek against a seller; however, deemed knowledge would be assessed by the courts on a case-by-case basis, unless it relates to any wilful misconduct, gross negligence or fraud.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

There is no pricing practice that is customary and mainly depends on the structure of the transaction. There has also been a noticeable increase in the use of the 'locked box' approach to consideration, particularly where there is private equity player selling or buying. However, there has been an increase in the use of purchase price adjustment mechanisms by buyers and sellers in determining the consideration to be paid. Where the purchase price is subject to adjustment, most

commonly this is based on completion accounts (earn-out mechanisms being relatively rare but they do exist in certain types of management buy-outs).

Form of consideration

18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

In the majority of transactions, the consideration is cash, which can be paid in a variety of ways, such as:

- a lump sum payment at completion;
- in instalments post-completion; and
- with parts of the consideration deferred or retained for payment at a later date.

However, an escrow arrangement is commonly used in all types of transactions.

The buyer is free to offer more favourable terms to certain shareholders, provided that, in a limited liability company, the other shareholders do not exercise their pre-emption right.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Earn-outs are not used at all and deposits are rarely used. Escrows are very commonly used because share transfers usually require multiple steps and so they are commonly used as a completion mechanic to ensure that payment is made at completion and where there is retained consideration. It is more common to use documentary escrow arrangements than a funds escrow, because of the cost involved and depending on the period of time funds are kept in escrow.

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

Leveraged finance structures are uncommon in the UAE. Acquisition finance is typically provided as a corporate facility to a purchaser that is creditworthy or benefits from a guarantee from a creditworthy parent company. The use of any other types of acquisition is uncommon.

Credit facilities may be either conventional or Sharia-compliant (or a combination of both). Unless the purchaser has its own Sharia-compliance requirements, the choice between conventional and Sharia-compliant financing is usually driven by the choice of the lenders.

In terms of securities, there is common use of guarantee cheques, corporate guarantees and pledge over the shares of the company and other assets of the purchaser or any of its group companies.

Limitations on financing structure

21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

The CCL prohibits financial assistance in respect of an acquisition of shares in a private joint stock company. Neither the company in question nor any of its subsidiaries may give financial assistance to any person to subscribe for or acquire its shares, bonds or sukuk (an Islamic financial instrument similar to a bond, which complies with Sharia).

This extends to the grant of security by the target over its assets to secure borrowings made to the seller to finance the acquisition of shares in the target.

Financial assistance is a new concept in the UAE and is as yet largely untested. There are no equivalent provisions in relation to the acquisition of assets or LLCs. However, a seller is not restricted from giving financial assistance to a buyer in connection with a transaction.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 | Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Transactions are often subject to conditions precedent. Customarily, those include special approvals from authorities, board approvals, obtaining consents from certain counterparties, exemptions from land department fees and any other requirements that are revealed by the due diligence exercise.

23 | What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

The obligations placed on a buyer or seller to satisfy conditions precedent depend on whether such party has complete control of such requirement as opposed to requiring the assistance and the cooperation of the other party or a third party or authority. Generally, if a party is unable to satisfy such conditions after using its best efforts to do so up until the long-stop date, the other party would either agree to extend the long-stop date to give such party more time or it would choose to proceed with the transaction regardless or simply opt for the termination of the agreement.

Pre-closing covenants

24 | Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Pre-closing covenants are normally agreed to by the parties and would generally include carrying-out the business in the ordinary course and not entering into any transaction or deals without obtaining the prior written consent of the purchaser. In the event of breach, generally the purchaser has the right to terminate the agreement and/or seek damages for any losses incurred.

Termination rights

25 | Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Parties have the right to terminate a contract if the other party makes a misrepresentation and the contract has been entered into by a 'gross cheat' (article 187, Civil Code). Deliberate silence about a fact or circumstance will be treated as a misrepresentation if it is proved that the person misled the other and thereby would not have agreed to the contract if aware of that fact or circumstance (article 186, Civil Code).

It is also common to see provisions stating that, if the Commercial Register is not updated (definitive evidence of the share transfer having been completed) within a specified time, the buyer or seller may give notice to terminate the share purchase agreement (SPA). The parties will then cancel the application process and re-transfer full legal and beneficial ownership in the shares to the seller, and the SPA will then terminate, save for clauses that do not lapse (such as confidentiality).

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

The UAE onshore laws do not explicitly address break-up fees. While break-up fees are still less common in the UAE, their relevance has grown. In private M&A transactions, break-up fees may be used provided that they are not excessive.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

Warranties and indemnities are typically included in acquisition agreements. Their scope is subject to negotiations between the parties. However, under UAE law, there is no clear distinction between warranties and indemnities in the way they are distinguished under common law jurisdictions.

A full scope of warranties in the context of a share sale usually includes warranties relating to the following:

- the seller's title to the shares or assets and capacity to enter into the relevant transaction documents;
- corporate information and licences;
- accounts and finances;
- records of the business;
- assets;
- debt and guarantees;
- insurance;
- material contracts;
- compliance with the law, including international sanctions and anti-money laundering laws;
- litigation;
- insolvency;
- intellectual property and information technology;
- employees;
- anti-bribery and corruption;
- real estate;
- tax (mainly VAT for now); and
- environmental matters.

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Limitations on the seller's liability typically include the following:

- matters fairly disclosed in the disclosure letter, that is, matters disclosed with sufficient detail so that the buyer can properly assess the matter being disclosed and its impact on the business. These matters cannot then be claimed as a breach of warranty;
- a de minimis, that is, where the value of a potential claim is below an agreed minimum value;
- a basket, that is, a claim or claims must reach an agreed value before a buyer can make a claim against the seller;
- a cap on overall liability; and
- time limits within which any claims must be brought.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Despite the relatively high cost of procuring warranty and indemnity insurance, it was used in a limited number of M&A deals. This was typically either where sellers wished to reduce their exposure (for instance, private equity sellers) or where the buyers requested the further comfort of warranty and indemnity insurance (for instance, where the seller might not have the assets or substance to guarantee the warranties and indemnities).

The use of insurance by the seller is on the increase in the region. It is most likely in transactions involving private equity sellers. There is no standard on who would put in place the insurance and bear its cost. It is based on the outcome of negotiations between the parties. Regarding the terms of the insurance, it is also the outcome of negotiations with the insurance company and would likely not include certain warranties or indemnities.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

It is typical to agree to post-closing covenants, which usually include non-competition and non-solicitation. It could also include an obligation to change the name of the company within a certain period or to provide transitional services.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Share sale

No transfer tax is payable on transfers of shares in UAE mainland companies. However, a fee is payable on signing the share transfer document before the notary. For the purposes of the share transfer document, it is usual for the consideration to be stated as the nominal value of the shares and not the actual consideration payable under the sale and purchase agreement.

In Dubai, where the value stated in the share transfer document is less than 100,000 UAE dirham, a fee of 300 UAE dirham per signature is payable. Where that value is more than 100,000 UAE dirham, the fee payable is 0.5 per cent of the stated value, subject to a maximum of 15,000 UAE dirham.

In Abu Dhabi, where the value stated in the share transfer document is between 100 UAE dirham to 50,000 UAE dirham, a fee of 500 UAE dirham per signature is payable. Where the value is between 50,000 UAE dirham to 200,000 UAE dirham, a fee of 1,000 UAE dirham per signature is payable. Where the value is 200,000 UAE dirham or above, the fee payable is 0.5 per cent of the stated value subject to a maximum of 20,000.

Free zone authorities typically charge nominal administrative fees for notifying of or applying for a change of shareholder. This varies from free zone to free zone, for example, the ADGM charges a fee of US\$100, while there is no charge in the DIFC.

There are also some minor diverse administrative fees payable to the economic departments in each emirate.

If the target either owns or was granted rights over real estate assets, any transfer in the ownership of shares of the target is deemed

to constitute a transfer of the real estate interest whether the target is located within the UAE mainland or a free zone. Accordingly, transfer fees may be payable to the relevant authority.

For the emirate of Dubai (mainland and free zones, but excluding the DIFC), the current transfer fee applicable for the transfer of ownership of a real estate asset is 4 per cent of the sale consideration, or market price, if higher. The transfer fee rate varies between each emirate and the nature of the real estate interest being transferred. Further, in some emirates, a share deal does not trigger such fees as an assignment of the real estate asset to another company would.

Asset sale

Any transfer of a real estate asset or interest can potentially require payment of a transfer fee to the relevant authority (see 'Share sale').

In addition to a transfer fee, the sale or transfer of a real estate interest can also potentially result in a VAT liability. In accordance with the VAT law, the following rates are currently anticipated to be charged on real estate assets:

- zero rated: first supply by sale or lease of residential property within three years from the date of construction or conversion, or first supply by sale or lease of residential property to a registered charitable organisation (no time frame);
- exempt: residential property to the extent not zero rated and bare land: and
- chargeable, currently 5 per cent: all other property transactions.

In relation to the transfer of a business and assets more generally, VAT law provides that 'the transfer of the whole or independent part of a Business from a Person to a Taxable Person for the purposes of continuing the Business that was transferred' is not considered a taxable supply and will not be subject to VAT. The parties to a proposed asset sale should carefully consider at the outset of the transaction whether that transaction will fall within this exemption and the potential VAT implications to the extent that it does not.

Corporate and other taxes

- 32 | Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Share sale

There are currently no corporate (income or capital) taxes levied on the proceeds received from a share sale.

Asset sale

Any transfer of a real estate asset or interest can potentially require payment of a transfer fee to the relevant authority (see 'share sale').

In addition to a transfer fee, the sale or transfer of a real estate interest can also potentially result in a VAT liability. In accordance with the VAT law, the following rates are currently anticipated to be charged on real estate assets:

- zero rated: first supply by sale or lease of residential property within three years from the date of construction or conversion, or first supply by sale or lease of residential property to a registered charitable organisation (no time frame);
- exempt: residential property to the extent not zero rated and bare land: and
- chargeable, currently 5 per cent: all other property transactions.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

- 33 | Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Share sale

Under a share sale, the employee's contract remains in place and unchanged unless the parties agree otherwise. If the employer wishes to terminate the employment contract, he or she must follow the normal procedure, serve the contractual notice period and pay contractual and statutory entitlements.

Asset sale

Employees do not automatically transfer to a buyer in a business sale in the UAE. If a buyer wishes to take on the seller's employees, the seller must first terminate their employment and cancel their visas, if a visa sponsor. The buyer must then re-employ the employees and sponsor their UAE visas.

Depending on the terms agreed between the buyer and the seller, it may be necessary for the seller to terminate an employee's contract by providing the required notice or payment in lieu of notice, and settling statutory and contractual dues, including end of service gratuity. The buyer may then re-hire on substantially the same or new terms of employment. Alternatively, a buyer may agree to assume all liabilities of the employees to ensure continuity of service.

If an employee does not wish to be employed by the buyer, his or her employment can be terminated, subject to the terms of the contract of employment and statutory requirements.

There is no concept of redundancy under UAE law. Therefore, termination of employees on unlimited term contracts, unless related to poor performance or under one of the specific grounds of gross misconduct, can be treated as arbitrary dismissal. This can mean employees are entitled to claim compensation for arbitrary dismissal in addition to their other contractual and statutory entitlements.

An employee's entitlements can include, subject to the terms of their contract:

- payment in lieu of notice;
- payment for allowances; and
- payment for unclaimed annual leave.

End-of-service gratuity may be payable under statute, subject to the employee's length of service. If an individual is leaving the UAE, the employer must cover the cost of that person's flight to their home country.

Notification and consultation of employees

- 34 | Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There is no obligation under UAE law on the seller, in relation to share or asset sale, to consult with its employees before terminating that employee's employment. However, there may be specific rights under an employee's contract.

Transfer of pensions and benefits

- 35 | Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

End-of-service gratuity (pension for GCC nationals) and other benefits automatically transfer with the employees of a target company in the case of a share transfer, unless otherwise agreed by the parties. However, in the case of an asset deal, they do transfer and would need to be payable under statute.

UPDATE AND TRENDS

Key developments

- 36 | What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

In November 2018, the new Foreign Direct Investment Decree Law No. 19 of 2018 (FDI) was issued introducing, among other things, the framework under which the UAE Cabinet will exercise its powers in respect of permitting increased levels of foreign ownership.

The FDI Law establishes a 'negative list' of sectors in which no changes will take place and refers to a 'positive list' of sectors of the economy in which greater levels of foreign investment will be permitted than is currently the case. This positive list was recently released (July 2019) to include the sectors of the economy where foreign ownership can be increased to up to 100 per cent, subject to other conditions, such as minimum capital requirements.

In addition to the restrictions on share ownership, certain business activities are reserved for UAE nationals or increased percentages of local ownership. These activities are established by the FDI Law in the 'negative list', which includes, for instance, oil exploration and production and banking and financing activities.

Ministerial Decree No. (797-2) of 2018 on 25 October 2018 amended some of the provisions of Ministerial Decree No. 539 of 2017 regulating private joint stock companies, especially since it amended articles 55 and 56 relating to acquisitions of PrJSC.

Coronavirus

- 37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The UAE federal government is incentivising banks to moderate any potential enforcement actions that they might be considering against small and medium-sized enterprise borrowers in particular, but currently the only direct state aid that is being publically discussed is in relation to Dubai's flag-carrier, Emirates (which is wholly owned by the government of Dubai through the Investment Corporation of Dubai).

With the exception of corporate tax on oil and gas companies and branches of foreign banks, the UAE does not impose corporate tax on businesses registered onshore. Businesses registered in free zones are exempt from corporate tax for certain specified time periods which vary between free zones. VAT of 5 per cent was introduced in the UAE a few years ago, but there are no proposals to make changes in relation to the rate charged as a result of the impact and consequences of the covid-19 global pandemic.



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The federal government and free zones have, however, introduced measures to relieve the pressures facing businesses. These measures include lowering or suspending fees for licence renewals and reforming employment regulations in order to give employers greater flexibility. It is important that companies are aware of the various fee reductions being offered so as to be able to factor these in to short-term budgets and utilise them to the fullest extent.

With regards to contracts, a party to a contract may wish to seek to rescind it by arguing that the circumstances of covid-19 amount to a force majeure event. In order to succeed, under UAE law, the party making such a claim would need to demonstrate that the covid-19 pandemic qualifies as an event that is 'exterior, unpredictable and irresistible' to the parties to such contract (and that such agreement was concluded before national and international authorities started to warn about the threat of the virus). It must be proven that covid-19 has rendered execution of the obligations under the agreement objectively impossible. This will be determined by courts on a case-by-case basis, but it should be borne in mind that the UAE courts have historically interpreted this condition narrowly.

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